IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 439

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION OF APPELLEE, BOWMAN DAIRY COMPANY, TO AFFIRM OR DISMISS.

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Appellee, Bowman Dairy Company, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed or that the appeal be dismissed on the ground that the question is not fairly presented by the record, and is so insubstantial as not to warrant review by this Court.

OPINIONS BELOW.

The opinions below are adequately set forth in the Jurisdictional Statement.

JURISDICTION.

The Jurisdictional Statement is defective in that it does not state the court in which the notice of appeal was filed as required by Rule 15(1)(b)(ii) of this Court.

QUESTION PRESENTED.

Whether appellee Bowman Dairy Company has by its cost justification defense under the "Provided" clause of Section 2(a) of the Clayton Act, justified the difference in discounts allowed to two A & P stores (which Bowman no longer serves) and one Kroger store as compared with each of five independently owned grocery stores (of approximately 2,200 served by Bowman).

STATUTE INVOLVED.

The statute involved is adequately set forth in the Jurisdictional Statement.

STATEMENT.

In order to identify the Robinson-Patman Act issues which were raised against Bowman in the trial court, and preserved for review by this Court, it is necessary to restate the history of the case.

The Complaint, filed in 1951, contained two paragraphs involving the Robinson-Patman Act. It alleged that since 1941 defendants had discriminated among their store customers by practices such as lump sum cash payments, installment cash sums, and interest free loans. At the trial, in 1953, the Government offered evidence that some such practices had occurred in the past. Because that evidence related to old violations, and because a decree entered in a private suit against the defendants already assured that there would be no new violations, the trial court dismissed the Complaint at the close of the Government's case.

The private decree to which the Court referred was entered on December 3, 1952.[1] Prior to the entry of that decree, Bowman had employed an independent firm of management engineers to make time and motion studies and to develop an entirely new discount system for its store customers.[2] The new discount system was put into effect on February 1, 1953. It established a graduated discount schedule, providing for an increase in the discount rate for every increase in each store's average daily volume of purchases. A change of as little as one quart per day resulted in a change in the store's discount rate. Although the schedules have been modified from time to time, except for a period of a few weeks, Bowman has employed the graduated discount system continuously since 1953.[3]

In 1954, this Court held that the trial court had dismissed the Robinson-Patman portions of the Government case on an erroneous ground, and remanded the cause for further consideration of the need for equitable relief. Thereafter, in April 1955, the trial court granted the Government's motion to reopen the record to present such additional evidence bearing on the effectiveness of the private decree as might have been gathered by the Government.[4]

The case which was then developed and presented by the Government was entirely new. The Government did not contend that there had been any resumption of the old practices condemned by the private decree, or that Bowman had discriminated among its independent store customers. Instead, it made two new attacks on Bowman. One of these —the attack on the pricing to restaurants and hotels—has

1. *Dean Milk Company* v. *American Processing and Sales Company, et al.*, No. 49 C 1159, United States District Court for the Northern District of Illinois.

2. Supplemental Pre-Trial Order as to Bowman, entered December 23, 1957, pp. 11-17.

3. Bowman Exhibits 5 through 13, inclusive.

4. Order of April 18, 1955.

now been abandoned. The other was a limited attack on the different prices charged to a handful of carefully selected chain and independently owned stores.

In March 1955 Bowman served 2,180 independently owned stores and 163 A & P and Kroger stores. From this large group of customers, the Government selected two routes on each of which Bowman served a large independent store and a small chain store. Although over 98% of the independent stores purchased less than 200 points per day,[5] each of the independents selected by the Government purchased more than 200 points. On the other hand, all of the specific chain stores picked by the Government were far below the size of the average chain store unit. These stores are specifically identified in Schedules I and II to the Supplemental Pre-Trial Order as to Bowman entered on November 4, 1955.

As a part of its *prima facie* case of price discrimination among these specific stores, the Government also offered evidence of competitive injury. This evidence included a map pinpointing the locations of the selected stores, the fact that each of the two routes served both a chain and an independent, and the inference that in view of the proximity of the stores, competition among them must have been affected by the discount differentials.[6] On this issue of competitive injury both parties thereafter introduced a great volume of evidence including market analyses of the trading areas served by each of the stores, questionnaires and interviews of customers of the stores, and other relevant data.[7] On this issue the trial court ultimately found

5. Supplemental Pre-Trial Order as to Bowman entered on December 16, 1958, p. 10.

6. See Supplemental Pre-Trial Order as to Bowman entered on November 4, 1955, paragraphs 7, 8 and 16 and plaintiff's Exhibit 5 thereto.

7. See Supplemental Pre-Trial Order as to Bowman entered December 23, 1957, pp. 2-11; Supplemental Pre-Trial Order as to Bowman entered December 16, 1958, pp. 2-3.

that the stores were in competition with each other and that there may be an injury to competition. Thus, the Court found that the plaintiff had made out a *prima facie* case of price discrimination among the selected stores.

No other stores were identified in the plaintiff's *prima facie* case. Except for the evidence pertaining to those stores, no evidence of injury to competition was offered by the Government. Having proved its *prima facie* case of price discrimination between those selected independent and chain store units, the Government rested. Plaintiff then contended that the burden had shifted to Bowman to justify the specific price differentials on an individual store by store basis.

The cost defenses presented by Bowman did justify the price differentials on a store by store basis. Bowman Exhibit 14 includes a study of the cost of serving each of the stores identified in the Government's *prima facie* case. The study shows that in every case except one, the lower net price to the chain store was substantiated by cost differences. The one exception, amounting to an unjustified difference of one-tenth of one per cent, involved a comparison between a store in the Goldblatt chain and a store in the A & P chain. The record shows that Bowman has since lost both of these chains as customers.[8]

The cost defenses presented by Bowman also included a computation of the amount of discount that could have been justified for each store in the A & P and Kroger chains on an individual basis. The permissible discount for each of the separate chain store units was then listed, and all were totalled to produce the permissible discount for the entire chain. The total was larger than the amount which actually had been paid on the basis of 11% to the entire chain. A few of the chain store units earned less than 11%,

8. Supplemental Pre-Trial Order as to Bowman entered December 16, 1958, p. 21.

but most earned more. Since the average exceeded 11%, the entire discount was justified on a store by store basis.[9]

These cost defenses were introduced into evidence by stipulation as part of the extensive pre-trial procedures followed in the District Court. To avoid an extended trial, the Government was permitted unlimited access to the underlying materials used by the engineers in making their cost studies.[10] The parties limited the issues by stipulation, thereby obviating the need for offering evidence on matters which were not in dispute. Thus, the Government's objections to the cost studies submitted by Bowman were identified and limited by pre-trial order. Those objections do not include the point sought to be raised on this appeal.[11]

9. See Bowman Exhibit 14, pp. 10-11.

10. See Supplemental Pre-Trial Order as to Bowman entered on December 23, 1957, p. 1.

11. They were as follows:

"28. Plaintiff makes three objections to the method of testing discounts described in the basic manual (Bowman Exhibit 4) and employed in the March 1955 tests (Bowman Exhibit 14). These three objections are: (1) Plaintiff does not agree that an adequate sample of routes was used for the purpose of making the time studies used to develop the standard time allowances for the work elements described in Appendix A to the basic manual (Bowman Exhibit 4). The basis of plaintiff's objection is that the 55 time studies which were used in obtaining time data were all taken on routes operating out of the Elston Division. (2) The method of testing discounts described in the basic manual (Bowman Exhibit 4) and employed in Bowman Exhibit 14, assumes that the total cost per route per day, calculated as shown on Schedule 6 of the basic manual (Bowman Exhibit 4) and Schedule 1 of Bowman Exhibit 14, reasonably may be apportioned among different Bowman store customers on the basis of the standard time required by Bowman drivers to perform the services received by those different customers. Plaintiff takes the position that the total cost per route per day may not be apportioned among customers on the basis of route drivers' time. Plaintiff would accept an apportionment of drivers' compensation among different customers on the basis of drivers' time, but plaintiff contends that it is not acceptable to apportion the total cost per route day among different customers on the basis of

After describing the plaintiff's objections to the Bowman cost studies, the stipulation provided:

> "31. Except for the foregoing three objections, and one further objection to the test of the store discount plan effective January 2, 1956 (Bowman Exhibit 16) based on its analysis of sales of glass and fiber containers, which objection will be set forth in the plaintiff's rebuttal material, plaintiff has no objection to the validity of the cost studies submitted by the defendant Bowman to justify the differences in prices and discounts to Bowman store customers identified in the plaintiff's affirmative case." Supplemental Pre-Trial Order as to Bowman entered December 23, 1957, p. 22.

Each of the Government's three objections to the cost defenses offered by Bowman was the subject of extensive additional stipulated material, and each point was fully argued in the post-trial briefs in the District Court.[12]

Subsequent to the entry of the order limiting the plaintiff's objections to Bowman's cost defenses, the Government employed three well known cost accountants to testify as expert witnesses. These experts, Herbert F. Taggart, Otto F. Taylor and Albert E. Sawyer, were all members of the Federal Trade Commission Advisory Committee on Cost Justification under the Robinson-Patman Act. They

drivers' time because the total cost per route day includes items of cost in addition to drivers' compensation (see Schedule 6 of Bowman Exhibit 4 and Schedule 1 of Bowman Exhibit 14). (3) Plaintiff takes the position that the cost studies should have included an analysis of the Central Office overhead, including such items as executives' salaries and other costs incurred in the Central Office of the Bowman Dairy Company, and that such additional elements of cost should have been apportioned among the different customers of Bowman Dairy Company." Supplemental Pre-Trial Order as to Bowman entered December 23, 1957, pp. 19-21.

12. Supplemental Pre-Trial Order as to Bowman entered on December 23, 1957, pp. 26-30; Supplemental Pre-Trial Order as to Bowman entered on December 16, 1958, pp. 3-14.

made certain additional criticisms of the Bowman studies, which thereafter became the subject of additional stipulated material.[13] These additional points, however, are not raised on the present appeal. Despite the eminence of these expert witnesses, the Jurisdictional Statement omits any mention of their testimony.

In further rebuttal, the plaintiff also submitted a number of complicated charts and tables prepared by the staff of the Antitrust Division. One of these exhibits was specifically directed at the Bowman contention that one reason independent stores are more costly to serve than chains is that they use relatively more glass containers (which require extra handling) and relatively fewer fiber containers.[14] The rebuttal exhibit directed at this glass-fiber issue indicates that Bowman served two independent stores purchasing a combined average of about 1300 points per day. By simple division these are the two stores referred to in footnote 8 on page 16 of the Jurisdictional Statement as taking an average of 650 points per day. No evidence was offered by the plaintiff for the purpose of proving a *prima facie* case of price discrimination with respect to these two stores. The record does not even disclose their identity or their location.[15] Nothing further was added to the record after the filing of these rebuttal exhibits.[16]

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13. See, for example, Supplemental Pre-Trial Order as to Bowman entered on December 16, 1958, pp. 18-21.

14. The plaintiff's objection to this contention had been expressly preserved in the pre-trial order. See Supplemental Pre-Trial Order as to Bowman entered on December 23, 1957, p. 22.

15. The exhibit does indicate that the stores are served from Bowman South Division. That Division serves an area encompassing several hundred square miles. Approximately one-third of which is within the area covered by the complaint (Complt. ¶ 11).

16. At the time these exhibits were filed, Bowman also filed comments and analyses of the exhibits insofar as they related to the issues which had already been framed. See Supplemental Pre-Trial Order as to Bowman entered December 16, 1958, pp. 5-16. However, neither party treated the plaintiff's rebuttal exhibits as raising any new issues.

In the memorandum opinion, the District Court held that plaintiff had proved a *prima facie* case of price discrimination, stating:

> "Plaintiff has demonstrated by its Schedule I, comparing five grocery stores, chain and independent, within a radius of one mile and served by the same milk route, and by its Schedule II, comparing four stores, chain and independent, within another radius of one mile and served by the same milk route, that a price discrimination exists as against the independent stores under applicable discount quotations." (J. S. p. 25.)

It thereafter found that Bowman's cost defenses had been prepared in good faith and concluded that the price discriminations had been justified under the cost proviso of the Robinson-Patman Act.

ARGUMENT.

I. THE QUESTION PRESENTED IN THE JURISDICTIONAL STATEMENT IS NOT FAIRLY PRESENTED BY THE RECORD.

A. The Government states in its Jurisdictional Statement that the question presented by the record in this case is whether Bowman has cost justified "prima facie unlawful price discrimination in favor of all chain stores and against all independents" (J. S. p. 2). This appeal question assumes that a *prima facie* case was made of unlawful discrimination in favor of all chain stores and against all independents. This assumption is not supported by the record.

The Government's *prima facie* case against Bowman was limited to a showing with respect to nine stores identified on Schedules I and II of the Pre-Trial Order entered on November 4, 1955. With respect to those stores, the Government presented evidence that the price differentials might adversely affect competition among them. No evidence of injury to competition was offered with respect to any other store served by Bowman. Since the plaintiff's statutory burden was not met with respect to "all chain stores" as against "all independents," the question presented by the Jurisdictional Statement is purely hypothetical and should not be answered on this record.

B. The question presented, as amplified in the argument, assumes that the cost proviso required Bowman to show "that there are common savings in costs applicable to all the chains that are not applicable to any of the

independents" (J. S. p. 11). It is thus assumed that a *prima facie* case involving nine competitive stores shifts the burden to Bowman to justify all differentials among 2300 different stores without any evidence indicating which, if any, of these additional differentials may adversely affect competition. The question presented is thus beyond the scope of the Robinson-Patman Act. The Government should not be permitted to predicate an appeal on Bowman's alleged failure to cost justify a *prima facie* case never presented.

As a matter of procedure, since the plaintiff selected certain specific stores for the purpose of testing the legality of Bowman's prices, a defense which fully justified the prices to those stores should put an end to the litigation.

C. Because the record was developed primarily by stipulation in connection with a series of pre-trial conferences, a great mass of underlying data was omitted from the formal record. The original records and summaries developed during the time studies, the original accounting records setting forth Bowman's delivery expenses, the work papers detailing the calculations supporting the ultimate conclusions of the experts, and a great deal of other qualifying material was not placed in the formal record. No objection to this informal method of procedure was made by either party.

When objection was made, detailed evidence was assembled to meet the objection. When no objection was raised, it was assumed that it would be unnecessary to encumber the record with factual detail.

The Government's specific objections to the cost studies were carefully defined in the pre-trial order before the record was closed.[17] Bowman's position with respect to

17. See Supplemental Pre-Trial Order as to Bowman entered on December 23, 1957, pp. 19-23.

each of these objections is set forth in full in the record.[18] Those objections did not include the question presented by the Jurisdictional Statement. As pointed out below, the record does in fact provide a sufficient justification for treating chains and independents as separate classes of purchasers. However, since this point was not included in the plaintiff's objections to the studies, all of the evidence relevant to the issue has not been placed in the record. Instead, both parties find it necessary to cite portions of the rebuttal material (which was offered on an entirely different issue) in order to discuss the so-called "Question Presented".

Admittedly, the extent to which pre-trial procedures were employed in this case is not typical. Nevertheless, if such procedures are to serve the salutary purpose of shortening trials, limitations on the issues which are imposed by pre-trial order must be honored in appellate proceedings. The question presented by the Jurisdictional Statement was not preserved in the pre-trial order limiting the issues entered on December 23, 1957. Accordingly, plaintiff should not be permitted to raise that question in this Court.

II. THE QUESTION PRESENTED IS NOT SUBSTANTIAL.

A. The Jurisdictional Statement reiterates in various forms plaintiff's position that in order to justify separation of chains and independents into separate classes, it is necessary "to show that there were in fact cost savings applicable to *all* the chains that were not applicable to *any*

18. See Supplemental Pre-Trial Order as to Bowman entered December 23, 1957, pp. 23-30; Supplemental Pre-Trial Order as to Bowman entered December 16, 1958, pp. 3-21; see also the references to professional literature which were incorporated in the post-trial brief for the Bowman Dairy Company at pp. 23-26, pursuant to the Court's directions.

of the independents."[19] This position has been directly refuted by the Government's experts in this case. In the trial court the Government employed as its expert witnesses three cost accountants who were members of the Federal Trade Commission Advisory Committee on Cost Justification under the Robinson-Patman Act. Each of these experts—Professor Herbert F. Taggart, Otto F. Taylor and Albert E. Sawyer—signed the Cost Justification Report to the Federal Trade Commission, which contained the following statement:

> "Classification or grouping of customers, orders, commodities, and transactions has repeatedly been recognized by the Federal Trade Commission as a valid business practice. What this means is that it is not necessary to cost-justify each sale transaction or sales to each individual customer. This is important for cost-justification purposes, since if no transaction or customer could be treated as a member of a class or group the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale, or delivery in dealing with certain customers." (Cost Justification Report at p. 11.)

Each of these experts reaffirmed this statement in this proceeding.[20] Thus the Government's own experts have plainly stated that the cost justification which the Government now demands is a "refinement [which] would be outside the realm of practicability and would tend to make price uniformity a necessity * * *."

These views of the Government's experts have never been expressly rejected, even in this appeal. A question upon which the parties, or their expert witnesses, have agreed does not merit the attention of this Court.

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19. J. S. p. 11, emphasis added.

20. See Taggart Deposition, pp. 67-68; Taylor Deposition, pp. 33-34; Sawyer Deposition, pp. 43-44.

B. The question presented by the Jurisdictional Statement incorrectly assumed that the Bowman cost defense was presented "without showing any justification for treating the chains and independents as separate classes of purchasers."[21] In fact, however, the justification for placing A & P and Kroger in a separate class of purchasers is adequately shown by the record.

The discounts granted to independents were based on a sliding scale discount schedule which established a myriad of different net prices to the hundreds of customers purchasing dairy products from Bowman pursuant to those schedules. No claim has ever been made that any of the price differences among the different independents is illegal. In short, as a matter of law, the case would be the same if Bowman followed a flat, one-price policy for all of its independent store customers.

A more favorable price was allowed to A & P and Kroger. The question which is raised is whether the record shows *any* justification for treating these chain stores as a separate class of purchasers.

The independents purchased an average of less than 58 points per day.[22] Over 98% of the independent stores purchased an average of less than 200 points per day.[23] On the other hand, the average A & P and Kroger unit purchases an average of over 500 points per day.[24] Thus, *some* justification for treating these two chains in a separate class of purchasers is provided by the dramatic difference in the quantities which they purchase as contrasted with the quantities purchased by independents.

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21. J. S. p. 2.

22. Supplemental Pre-Trial Order as to Bowman entered on December 16, 1958, p. 10.

23. *Ibid.*

24. See Column 1 of Table 12-B submitted with Plaintiff's Rebuttal Pre-Trial Order as to Bowman entered on December 16, 1958.

In addition, there are significant differences in the methods of service. Costly in-store services, including cash collection, are provided for independents, but are not available for chains. It is true that the hundreds of independent store owners served by Bowman are not a homogeneous class of automatons, each taking precisely the same services with precisely the same frequency. Nevertheless, the acceptance of these services is characteristic of the group as a whole and constitutes a significant element of Bowman's cost of serving independents but not chains.[25] It supplies a proper justification for treating the chains as a separate class of purchasers.

Plaintiff seems to contend that the classification cannot be justified if it is possible that one or two stores have been placed in the wrong category. There are two obvious answers to this contention. First, there is no evidence that any specific store has been improperly classified.[26] Second, even if two or three stores out of 2300 were improperly classified, it would not therefore follow that the prices to all of the others would be illegal. Certainly, it would not follow that the prices to the chain store customers would therefore be illegal.

The record amply demonstrates that Bowman was justified in placing A & P and Kroger within a separate category for pricing purposes.

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25. See Bowman Exhibit 4, pp. 1-3, 7-10; Bowman Exhibit 14, pp. 1-2.

26. The plaintiff refers to two large (650 point) independents, apparently implying that they may not have received in-store services. The record shows, however, that *all* large independents did in fact receive such services regularly. See Supplemental Pre-Trial Order as to Bowman entered December 16, 1958 at p. 8.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be affirmed without further argument, or that the appeal should be dismissed.

Respectfully submitted,

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